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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1009.

ADRIANO MERLANO BERSIA ET AL.,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

No. 1010.

PAOLO PIERACCINI ET AL.,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

No. 1011.

LUIGI SCHIAFFINO ET AL.,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONERS.

HOMER L. LOOMIS,
Counsel for All Petitioners.
CHARLES RUZICKA,
Associate Counsel for Petitioners in Nos. 1010–1011.

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REPLY BRIEF FOR PETITIONERS.

There are in respondent's brief but three matters that call for reply.

I.

The Purpose of Titles II and III, Respectively, of the Act of June 15, 1917, as Evidenced by Their Historical Setting.

The first of these matters is the contention that Title III of the Act of June 15, 1917, c. 30, 40 Stat. 221, (18 U. S.

C. A., sec. 502), (Petitioners' brief, 13-14, footnote), was specially enacted to cover just such cases as these; which argument is predicated upon the theory that it was the destruction, by their German crews, of the engine machinery on the German ships tied up in American ports, in February, 1917, that was responsible for the measure.

A review of the legislative background disproves the assertion. That shows it was Title II that stemmed from the German engine damage; *not* Title III.

What eventually developed into Titles II and III were introduced as separate bills, *viz.* S. B. 6795 and S. B. 6793, away back on August 5, 1916, by Senator Culberson of Texas, not only long before any damage had been done to the machinery of the German ships, but presumably long before anyone had anticipated that such damage might possibly be done. As to the time and circumstances under which that damage was done, see the vivid account prepared by the United States Department of Justice as, in part, reproduced in the appendix, attached hereto, marked A, and made a part hereof.

Except for enlarging the class of vessels affected by it, S. B. 6793 passed through the stirring events of February, 1917, without change, and became Title III precisely in the form and language in which it was originally introduced at a time more than ten months before.*

* A Chinese, or exact, copy of the bill (S. B. 6793), as originally introduced, follows:

"64th Congress, 1st Session. S. 6793

In the Senate of the United States.

August 5, 1916.

Mr. Culberson introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL

To prevent and punish willful injury or attempted injury to, or conspiracy to injure any vessel, engaged in foreign commerce,

But S. B. 6795, on the other hand, underwent a complete metamorphosis right after, and obviously as a result of, the Germans' damaging their ships' engines on or about February 1, 1917. It was entirely rewritten.

As originally introduced, it aimed merely at the prevention of the use of ships, laid up in our harbors, as dens for the hatching of plots against the United States and foreign nations; it contained no provision for a presidential proclamation of a national emergency, nor for the Secretary of the Treasury's assuming control over, taking possession of, or removing the officers and crews from, such ships; and, more important still, *it was wholly devoid of any suggestion*

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or the cargo or persons on board thereof, by fire, explosives, or otherwise.

1. *Be it enacted by the Senate and House of Repre-*
2. *sentatives of the United States of America in Congress Assembled,*
3. That whoever shall set fire to any vessel engaged in com-
4. merce with foreign nations, or her cargo, or shall tamper
5. with the motive power or instrumentalities of navigation of
6. such vessel, or shall place bombs or explosives in or upon
7. such vessel, or shall do any other act to or upon such
8. vessel while within the jurisdiction of the United States,
9. or, if such vessel is of American registry, while she is on the
10. high sea, with intent to injure or endanger the safety of the
11. vessel or of her cargo, or of persons on board, whether the
12. injury or danger is so intended to take place within the

1. jurisdiction of the United States, or after the vessel shall
2. have departed therefrom; or whoever shall attempt or con-
3. spire to do any such acts with such intent, shall be fined not
4. more than ten thousand dollars, and imprisoned not more
5. than ten years."

*that it should be unlawful for the owners, officers and crews of such vessels to injure or destroy them.**

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* A Chinese copy of the Bill (S. R. 6795), as originally introduced, follows:

"64th Congress, 1st Session. S. 6795

In the Senate of the United States.

August 5, 1916.

Mr. Culberson introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL

To authorize the collector of customs, or other officers duly empowered by the President, during time of war between foreign nations, to inspect private vessels within the jurisdiction of the United States for the purpose of detecting any use or attempted use of such vessel in violation of the law of nations or of the treaties or statute law of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the collector of customs, or other officers duly empowered by the President, at any time during war between foreign nations, or between factions within a foreign country, to inspect any private vessel within the jurisdiction of the United States for the purpose of detecting any use or attempted use of such vessel in violation of the statutes or treaties of the United States, or of the obligations of the United States under the law of nations.

2

Sec. 2. That it shall be unlawful for the owner or master, or other person in charge or command of any private vessel, within the jurisdiction of the United States, knowingly to permit said vessel to be used as a place of resort for any persons conspiring or preparing the means to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States, or knowingly to permit such vessel to be used in violation of the obligations of the United States under the law of nations; and in case such vessel shall be so used, with the knowledge of the owner or master, or other person in

But when this same bill (S. B. 6795) was reported out of the Senate Judiciary Committee on February 8, 1917, the damage to the engine machinery of the German ships having just been perpetrated by their crews, its character was wholly transformed into virtually that which, as Title II, it bears today (Vol. 54 Cong. Rec., Pt. 3, p. 2819).

And, quite as significantly, it was hailed in the public press of that time as having been "designed expressly to prevent the destruction or damaging by their crews of German ships lying in American ports". See Appendix A, attached hereto, *infra*, pp. 15-16.

In view of this legislative back-ground, there could seem to be no real doubt that it was Title II, not Title III, that was intended, as Judge Parker said, "to forbid and punish just such conduct" (*Bersia* v. *United States*, 124 F. (2d) 310, 313).

The obvious purpose of Title III on the other hand was to meet the need, — revealed in the case of *Daeche* v. *United States*, (C. C. A. 2d Cir.), 250 Fed. 566, tried in May, 1916, (*id.* 567), just two months before S. B. 6793 was introduced, — of a federal law preventing the destruction or injury of ships by trespassers for no purpose other than to imperil such ships, their cargoes and the persons aboard them. A glance at that case will show that it was only by the most refined of reasoning that the conviction of Daeche was finally upheld under the only statute then available, *viz.*, an old law designed against thieves and despoilers.

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13. charge or command thereof, the vessel, together with her
14. tackle, apparel, furniture and equipment, shall be forfeited
15. to the United States; and the owner, master, or person in
16. charge or command thereof, shall be fined not more than
17. ..... dollars, or imprisoned not more than .....
18. years, or both.
19. Sec. 3. That the President of the United States is
20. authorized and empowered to employ such part of the land
21. or naval forces of the United States as shall be necessary to
22. carry out the purposes of this Act."

The erroneous assumption in the Government's brief, that Title III had the "special purpose" of meeting the need for legislation disclosed by the German crews' damaging their own ships' machinery, not only underlies and vitiates respondent's argument as to the class of persons aimed at in Title III, contrary to all common-law principles of statutory construction, (Respondent's Brief, 9-12), but also misleads Government counsel into attributing to the language of Title III ("tamper") a distorted meaning designed to fit the erroneously assumed "special purpose" of the legislation (Respondent's Brief, p. 12, foot-note).

The same error misleads them into giving to Title III a construction that would make it applicable to all ships, even though not engaged in foreign or interstate commerce or commerce relating to and essentially affecting the same (*id.* 15), and, therefore, into giving it an effect that, as pointed out *infra* (7-10), must render Title III unconstitutional and void.

The same erroneous assumption, *viz.*, that Title III was born of the German ship damage, with a "special purpose" to cover such cases, likewise betrays respondent's counsel into the false position that Congress must have intended the severe penalties imposed by Title III to be leviable upon persons acting without any criminal intent whatever (Respondent's Brief, 16); and, at the same time, has induced those counsel to construe the specific intent, plainly defined to the contrary in Title III, as inclusive of an intent not only to imperil the safety of ship, cargo and persons aboard her, but also of one merely to wreak some injury upon her or her equipment (*id.* 16).

It is thus readily apparent how completely the initial error of attributing, to Title III, the legislative genesis peculiarly applicable to Title II, has pervaded and rendered fallacious the entire argument here advanced on the respondent's behalf.

II.

The Attempt to Give Title III an Application to Ships Not Engaged in Foreign Commerce.

The second matter in respondent's brief, that calls for a reply is the contention that the ships embraced in Title III are not, by fair implication, confined to those engaged in foreign commerce.

Petitioners' reply to that argument is that it would necessarily condemn Title III as unconstitutional and void.

Title III literally includes, as vessels subject to its terms, all vessels "of the United States as defined in section three hundred and ten of the Act of March fourth, nineteen hundred and nine, entitled 'An Act to codify, revise, and amend the penal laws of the United States'."

Such vessels include every boat, big or little, whether propelled by steam, by sail, by mule, or by hand, wherever kept and operated in the United States, not only in or upon what are known as navigable waters, but also in and upon every little river, canal, creek, or lake, lying wholly within the respective borders of the different States of the Union.

Such vessels include every tugboat, barge, lighter, canal boat, yacht, motor launch, rowboat, skiff and canoe within the territorial United States.

The only qualification required to bring all such vessels within the ambit of Title III, if a literal interpretation is to be given thereto, is that they belong in whole or in part to a citizen of the United States. For section 310 of the Act of March 4, 1909, c. 321, 35 Stat. 1148, reads as follows:

> "The words 'vessel of the United States,' wherever they occur in this chapter, shall be construed to mean a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof."

Petitioners believe that it would be unreasonable to attribute to Congress an intention to legislate for the welfare and safety of all such vessels; and that, if Congress did so intend, it wanted the constitutional power so to legislate.

That Congress lacked the constitutional power to legislate with respect to all such vessels, unless engaged in commerce with foreign nations or between the states or territories of the Union, would seem clear.

> "It is not intended to say, that these words" (the constitutional grant to Congress of the power to regulate commerce with foreign nations, etc.) "comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary."
>
> *Gibbons* v. *Ogden*, 9 Wheat. 1, 194.

> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."
>
> *Id.* 195.

It was, as this Court will recall, because the first Federal Employers' Liability Statute (Act of June 11, 1906, 34 Stat. 232) applied indiscriminately to commerce, intrastate, as well as interstate, that it was held unconstitutional (Employers' Liability Cases, 207 U. S. 463); even though it applied only to such commerce when it was transacted by interstate carriers.

Title III is not an emergency statute. But, even had it been such, it could not have enlarged the constitutional power of Congress to deal with matters over which Congress had been given no regulative power (*Schecter Corp.* v. *United States,* 295 U. S. 495, 528-529).

It seems clear, therefore, that Title III, in order to be constitutional, must be held to be qualified and limited not only by the heading of Title III, but by the title of the chapter, both of which point to vessels engaged in foreign commerce. Such a construction gives ample room for the operation of the statute with respect to vessels belonging to citizens of the United States and not registered. The statute would thus apply to all tugboats, lighters, barges, and other craft plying in and about the various ports of the United States, while engaged in feeding foreign commerce in such ports to the larger steamers that thereafter take it across the seas, or while engaged in helping to deliver and distribute to inland carriers the foreign commerce brought into those ports from abroad, and there discharged from such larger steamers. These smaller craft, while so engaged, are quite as much engaged in foreign commerce as could be any steamers of foreign or American registry.

Since, then, Title III must be unconstitutional if it be held to apply literally to the vessels described therein, and becomes at once both constitutional and reasonable if its application be confined to vessels engaged in foreign commerce, the former construction should be avoided and resort be had to the latter.

> "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. *Federal Trade Comm'n* v. *American*

Tobacco Co., 264 U. S. 298, 307; *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co.* v. *Boone*, 270 U. S. 466, 472; *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346."

Labor Board v. *Jones & Laughlin*, 301 U. S. 30.

III.

Judge Sibley's Opinion.

The third matter, in respondents' brief, calling for a reply, is its reference to the opinion of the Circuit Court of Appeals in *Marchese* v. *United States* and five companion cases involving facts substantially identical, save in formal features, with those constituting the cases at bar; which opinion was delivered on March 9, 1942, and, therefore, at a time too late to permit a reference thereto in petitioners' brief.

A timely application for a rehearing is pending undecided in those cases.

There are four positions assumed in the opinion of that court, written by Judge Sibley, that, we feel, call for consideration at this time.

First, the court attempts to reconcile section 3 of Title II and Title III by holding the former to have been inoperative, at the time of the events here in question, for want of a proper presidential proclamation. Petitioners believe the effort vain; and that it is immaterial whether section 3 of Title II was or was not meant to be effective only in times of unlimited national emergency. For Congress did therein deal specially with the case of damage done to ships by their owners, officers and crews and other persons, acting in conjunction therewith, in American ports. If Congress meant such acts, as interdicted in that section, to be punishable only in times of emergency, then it must follow that Congress did not mean them to be pun-

ished at other times under the general terms of some other statute.

Secondly, Judge Sibley says (Respondents' Brief, 29): "It would be absurd to say that an owner may do some of the things prohibited, such as placing a bomb on the vessel, or setting a fire, with intent to injure either persons on board, or the cargo."

Petitioners believe that, in so holding, the learned Judge overlooked the fact that he was pronouncing absurd the common-law rule governing the construction of statutes relating to the destruction of property; that that rule, like all others of the common law, was founded upon reason; that at least one reason justifying such rule was that self-interest is ordinarily a sufficient deterrent to prevent men from destroying their own property; and that, if it be absurd to say that an owner *may* set fire to his vessel with intent to injure persons or cargo or both, it would be no less absurd to suppose that he *would* do so, and to provide by general legislation against such an event.

Thirdly, Judge Sibley, in construing Title III as applicable to the owner of the chattels referred to therein, points to the *power* of a legislature to prevent an owner's destruction of his own property, when public interests are concerned, and cites, as instances, fish and game statutes, conservation statutes and laws relating to coal and oil deposits. (Respondents' Brief, p. 27.)

Petitioners believe that, in so ruling, Judge Sibley overlooked the fact that fish and game are not chattels, but that title thereto, while the same remain within a given state, is in the sovereign thereof, as trustee for the people as a whole, (*Geer* v. *Connecticut*, 161 U. S. 519; *Lacoste* v. *Dept. of Conservation*, 263 U. S. 545, 549; *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422, 426); that the conservation statutes

referred to by the court relate to public, not private, forests (*Shiver* v. *United States*, 159 U. S. 491; *United States* v. *Paine Lumber Co.*, 206 U. S. 467); and that oil deposits are natural products not wholly beneath the soil of any one land-owner and incapable of being captured without at the same time affecting adjacent or neighboring land-owners. And, as to coal deposits, petitioners know of no instances of an owner's having been restricted in his output.

But, apart from all that, the question here, save in its Constitutional aspects as more particularly argued elsewhere, is not so much one of power, as it is of the imputation to a legislature of the exercise of such power from the merely general words of a statute and contrary to all accepted rules of statutory construction.

Fourthly, Judge Sibley is clearly in error in holding (Respondents' Brief, p. 27) that the phrase, "endanger the safety of", was an after-thought or later addition inserted in the bill that finally became Title III and not originally included in the draft thereof as first introduced. We have shown *supra* (2-3, foot-note) that bill (S. B. 6793) exactly as it read when first introduced on August 5, 1916. It then contained the phrase in question and kept it unaltered thereafter at all times through its emergence into law.

Conclusion.

The Writs of Certiorari prayed for should be granted to the end that this Court may review and reverse the judgments entered below.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for All Petitioners.

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Associate Counsel for Petitioners in Nos. 1010–1011.